

**STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD**

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, :	:	
LOCAL 1590,	:	
	:	
Charging Party,	:	
	:	ULP No. 18-04-1145
v.	:	
	:	PROBABLE CAUSE DETERMINATION
CITY OF WILMINGTON, DELAWARE,	:	
Respondent.	:	

BACKGROUND

The City of Wilmington (“City”) is a public employer within the meaning of §1602(l) of the Police Officers’ and Firefighters’ Employment Relations Act, 19 Del.C. Chapter 16 (“POFERA”).

The International Association of Firefighters, Local 1590 (“IAFF”), is an employee organization and an exclusive bargaining representative, within the meaning of 19 Del.C. §§1602(g) and (h). IAFF Local 1590 represents the bargaining unit which includes all firefighters employed by the Wilmington Fire Department at and below the rank of Battalion Chief.

The City and IAFF Local 1590 are parties to a collective bargaining agreement for this bargaining unit, which has a term of July 1, 2012 through June 30, 2016.

On April 27, 2018, the IAFF filed an unfair labor practice charge with the Public Employment Relations Board (PERB) alleging conduct by the City in violation of 19 Del.C. §1607 (a)(3) and/or (a)(5), which state:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

The IAFF alleges the City violated these provisions “by implementing a change in Residency without negotiating, mediating, and, if necessary, resolving by binding interest arbitration.” The IAFF requests PERB find the City has violated the statute as alleged, require the City to cease and desist from modifying Residency unless and until it has negotiated and reached agreement, and to grant all reasonable remedies to make the IAFF and its members whole, including attorney’s fees.

On June 6, 2018, the City filed its Answer to the Charge, denying the conclusions and assertions made by the FOP that it had violated the POFERA. Included with its Answer was New Matter. The City asserts 1) the definition of residency is not a mandatory subject of bargaining; 2) the collective bargaining agreement was expired at the time the 2018 Declaration of Residency was provided to bargaining unit members; 3) the City does not have duty to negotiate or maintain a non-mandatory subject of bargaining after expiration of the collective bargaining agreement; and 4) The IAFF failed to object to the 2018 Declaration of Residency when it had the opportunity to do so as early as October, 2017. The City requests the Charge be dismissed with fees and costs assessed against the Charging Party.

The IAFF filed its response to the City’s New Matter on June 14, 2018, in which it denied the legal positions set forth therein.

This probable cause determination is based upon a review of the pleadings submitted in this matter.

DISCUSSION

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of determining whether probable cause exists to support an unfair labor practice charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE.PERB, 2004).

The IAFF alleges that on January 2, 2018, the City delivered a memorandum to bargaining unit employees directing them to complete and submit the "Annual Residency & Outside Employment Declaration" by January 11, 2018. In its Charge, it asserts the form included "material changes to the terms and conditions of the residency requirement based on changes to the definition of residency." Citing decisions from Ohio, Florida, New York, Pennsylvania, Illinois and New Jersey, the IAFF argues residency requirements are mandatory subjects of bargaining; consequently, by implementing a change, the City violated the POFERA by effectuating a unilateral change in a mandatory subject of bargaining without negotiation with and agreement by the exclusive bargaining representative.

The City denies it has implemented any change in the definition of residency and asserts it simply clarified the definition included on the declaration form. It asserts that no member of the IAFF has been disciplined or otherwise harmed as a result of this clarification. It also argues that

residency is a permissive subject of bargaining, over which it had no obligation to maintain because the collective bargaining agreement between these parties has been expired since June 30, 2016.

On their face the pleadings raise legal issues, including whether the definition of residency is a mandatory subject of bargaining, and if so, whether the City implemented a change without providing the IAFF the opportunity to negotiate such change. This will be the IAFF's burden to prove. The City has specifically asserted that the residency requirement is reserved to the City's exclusive prerogative and therefore constitutes an illegal subject of bargaining. The IAFF does not contest the City's authority to impose a residence requirement on its firefighters but challenges its authority to allegedly modify how residency is defined. Whether the definition of residency is reserved to the City's exclusive authority by 22 Del.C. §841 and/or the City Charter, as the City avers, will be considered as a preliminary matter in the PERB's decision.

The pleadings also raise a factual question as to when and how the alleged change was effectuated and whether the IAFF had sufficient notice to demand bargaining. In ¶4 of this Charge, the IAFF includes an excerpt from the Wilmington Fire Department Rules and Regulations. The City asserts the IAFF has wrongly cited the provision and requests PERB to review the actual document. I note that neither party has provided the referenced document in its original form.

For these reasons, the pleadings are sufficient, when considered in a light most favorable to the Charging Party, to establish that an unfair labor practice may have occurred.

A hearing will be promptly scheduled for the purpose of establishing a factual record on which argument may be considered in order to render determination on this Charge.

DETERMINATION

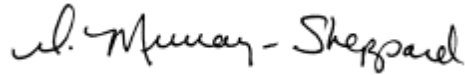
Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish that the City may have violated 19 Del.C. §1607 (a)(3) and/or (a)(5), as alleged. The

pleadings raise both questions of fact and law which can only be resolved following the creation of a complete evidentiary record and the consideration of argument.

WHEREFORE, a hearing will be promptly scheduled for the purpose of developing a full and complete factual record upon which a decision can be rendered concerning:

WHETHER THE CITY OF WILMINGTON INTERFERED WITH THE PROTECTED RIGHTS OF BARGAINING UNIT EMPLOYEES AND/OR VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH BY IMPLEMENTING A UNILATERAL CHANGE IN A MANDATORY SUBJECT OF BARGAINING CONCERNING THE RESIDENCY REPORTING PROCESS FOR CITY FIREFIGHTERS IN VIOLATION OF 19 DEL.C. §1607 (A)(3) AND/OR (A)(5).

DATE: August 20, 2018



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.